

ORIGINAL

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11/25/2016

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: AF 09-0688

IN THE SUPREME COURT OF THE STATE OF MONTANA

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No. AF 09-0688

NOV 25 2016

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CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN RE THE RULES OF)	State Bar of Montana
PROFESSIONAL CONDUCT)	Ethics Committee
PROPOSED ETHICS COMMITTEE)	
RULE 4.49(c))	COMMENT

Comes now the State Bar Ethics Committee, by and through its undersigned chairperson, and respectfully submits its comments on the proposed amendment to Rule 4.4, as set out in the court's order dated September 22, 2016.

The State Bar Ethics Committee's Recommendation

On November 3, 2016, the Ethics Committee conducted a telephonic meeting that included a quorum of the committee and several members of the Technology Committee. Prior to the meeting, the members of the Ethics Committee had reviewed ethics opinions, bearing on the issues addressed in the committee's proposed Rule 4.4(c), from Oregon and Washington. In addition, the committee had reviewed journal articles addressing similar subjects. In the course of the lengthy phone conference, members of both committees exchanged views, posed questions and objections, developed answers and in general engaged in an in-depth discussion of the committee's proposed Rule 4.4(c).

At the conclusion of the meeting, the Ethics Committee entertained a motion to recommend to the court the adoption of Rule 4.4(c) as originally drafted and proposed by the committee. The motion was seconded, and the committee voted unanimously in favor of adopting the amendment to Rule 4.4 as set forth in the court's order. The proposed rule is:

(c) A lawyer shall not knowingly access or use electronically stored information in a communication or document received from another

lawyer, for the purpose of discovering protected work product, privileged or other confidential information, unless the receiving lawyer has obtained permission to do so from the author of the communication or document. "Communication" and "document" as used in this rule exclude documents produced in discovery and information that is the subject of criminal investigation.

The Reasons for the Ethics Committee's Recommendation

The committee appreciates the degree to which technology pervades the practice of law. To that point, the committee unanimously recommended to the trustees of the State Bar the adoption of the ABA's proposed amendment to Rule 1.0, Terminology, to include in the rules as a defined term "electronic communications." Similarly, the committee recommended to the trustees that the ABA's amended Comment to Rule 1.1 on "competence" with "relevant technology" be given greater prominence by inclusion in the Preamble to the Montana Rules of Professional Conduct.

The committee, however, harbors concerns about what some commentators have termed "technological determinism," the notion that because technology enables certain conduct, the conduct must be accepted or even encouraged. In the view of the committee, technology should serve the norms of practice in Montana (established by the Montana Rules of Professional Conduct and informed by the Standards of Professional Courtesy to Clients, the Standards of Professional Courtesy Among Attorneys, the Standards of Professional Courtesy and Ethics Between the Judiciary and Attorneys, and the Ten Commandments for Trial Lawyers – all found in the State Bar's *Lawyers' Deskbook*) not the other way around.

The committee foresees technology's contribution to the erosion of professionalism and standards of courtesy in a rapidly changing bar. Last year, attorney Michael Rosenthal wrote in the *Wyoming Lawyer* about the changing demographics of the Wyoming bar after the adoption of the Uniform Bar Exam. At current admission rates, he predicted, nonresident lawyers in Wyoming would outnumber resident lawyers within a decade. And he observed that of the over 1000 nonresident lawyers, not one of them was currently serving on any standing committee or board of the Wyoming bar. See M. Rosenthal, "My Perspective,

Wyoming Lawyer (August 2015). Because Montana has also adopted the Uniform Bar Exam, the committee anticipates the same evolution of membership and participation in the Montana Bar. In the committee's view, this evolution threatens also to erode traditional standards of professional courtesy and conduct that have historically characterized the practice of law in Montana.

Against this background, the committee sees its proposed Rule 4.4(c) as a bulwark protecting the norms of practice in Montana against the temptation to utilize available technology for purposes that would undermine those norms.

Points of Agreement between the Technology Committee and the Ethics Committee

From their joint discussion of these issues, the Ethics Committee and the Technology Committee agree on several points:

1. Rule 4.4(b) applies to electronically stored information in a communication or document received from another lawyer when the receiving lawyer "knows or reasonably should know that the writing was inadvertently sent...." The rule requires the receiving lawyer to "promptly notify the sender."
2. Using special forensic software to "hack" an electronic document or communication violates Rule 4.4(a)'s prohibition against using "methods of obtaining evidence that violate the legal rights of such a [third-] person."
3. What constitutes reasonable care by a lawyer will probably evolve as technology evolves.
4. If information is inadvertently sent, the sender should be able to request that the receiving lawyer not examine the inadvertently sent information, and that lawyer should follow the sender's reasonable instructions about disposition.
5. The courts are the ultimate arbiters on the question of whether sending information was, in fact, inadvertent and whether an evidentiary privilege has been waived.

6. The proposed Rule 4.4(c) should not be viewed as a safe harbor for lawyers who have “failed to keep abreast changes in the law and its practice, including the benefits and risks associated with relevant technology.”

Concluding Comments

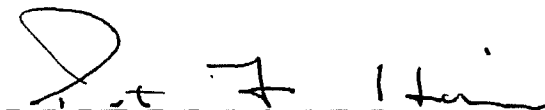
Members of the State Bar Ethics Committee appreciate but disagree with the objections raised by the Technology Committee through the committees’ collaborative discussion of these issues. The Ethics Committee’s proposed Rule 4.4(c) derives not, as the Tech Committee might suggest, from a fear of technology. Rather this proposal emanates from a concern that the availability of technology will be used to justify lawyer conduct that would not have been sanctioned but for the technology that enables it.

Lawyer conduct, after all, is the subject of the Rules of Professional Conduct. Technology will change – it has changed in the time it took to read this sentence. But the standards for the conduct of lawyers anchor our profession in the river of change and distinguish it from trades in the marketplace where technological innovation proscribes the only limit on permissible conduct.

DATED this 25th day of November, 2016.

STATE BAR OF MONTANA ETHICS
COMMITTEE

By its Chairperson:

A handwritten signature in black ink, appearing to read "Peter F. Habein", written over a horizontal line.

Peter F. Habein